TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~199~~. 43 X 2

JOHN GRAHAM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 9, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 199.

JOHN GRAHAM, APPELLANT,

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INDEX.

	Original.	Print.
Claimant's petition as amended	1	1
Final judgement of the court thereon	8	5
pplication of counsel of claimant for allowance of appeal and the order of the chief justice in vacation allowing the same	9	6
Finding of facts and the conclusions of law	10	6
Certificate	18	8

1 Court of Claims.

Amended petition.

JOHN GRAHAM
against
THE UNITED STATES.

To the Honorable the Court of Claims:

The petition of John Graham, of Flushing, in the county of Queens and State of New York, respectfully represents in this court, that he is a citizen of the United States and of the State of New York; that he has at all times borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against said government; that in the month of April, 1855, he was the sole owner of three certain steamships known respectively as the United States, of the burden of fifteen hundred tons, or thereabouts, the Ocean Bird, of the burden of two thousand tons, or thereabouts, and the St. Lawrence, of the burden of one thousand tons, or thereabouts;

2 that said steamships United States and Ocean Bird were then lying at the port of New York, and said steamship St. Lawrence, which was then absent from said port, returned thereto shortly afterwards, and before the third day of July, 1855; that your petitioner had made and entered into a contract with certain persons in the Island of Cuba for the sale of two-thirds interest in said three steamships, for the sum of $381,333, and to deliver said vessels at Havana on or before the 30th day of May, 1855; that in said month of April, 1855, your petitioner made and entered into a contract with Henry L. Kinney, Joseph W. Fabens and Fletcher Webster, for the temporary employment of said vessels in a voyage from New York to San Juan, in Nicaragua, a copy of which contract is hereto annexed, (marked A,) to which your petitioner prays leave to refer as a part of this petition.

And your petitioner further shows, that under and in pursuance of said contract, he caused the said steamship United States to be prepared and fitted for the voyage contemplated in said contract. And on the seventh day of May, 1855, the said steamship United States was fully prepared and fitted for said voyage, and provided with the necessary stores and fuel, officered and manned; and on said day your petitioner applied to the collector of customs at the port of New York for a clearance for said steamship for San Juan aforesaid, presenting to said collector the proper and necessary papers to entitle him to such clearance; that the said collector refused to clear said vessel for the reason, as he stated, and as your petitioner is informed and believes truly, that he had been directed by the President of the United States to refuse a clearance to said vessel; that on learning that said vessel was detained as aforesaid, by order of the

3 President of the United States, your petitioner was about to abandon said proposed voyage to Nicaragua, but said Kinney,

Fabens and Webster, the charterers of said vessel, in order to induce your petitioner to perform said voyage, offered and agreed to pay to your petitioner the sum of twelve hundred dollars per day, as and for the demurrage of said vessel, so long as the government should prevent the departure of said vessel, and that said sum of twelve hundred dollars per day was a reasonable and proper allowance for the demurrage of said vessel.

And your petitioner further shows, that on or about the 16th day of May, 1855, he had the steamship Ocean Bird in the port of New York fully prepared and fitted for sea, and was ready and desired to send her to Havana, where she was to be sold with said other steamships as above set forth, and where said steamships were to be placed on a line of steamships intended to be run between New York, Mexico, and Havana, for which line your petitioner was to be agent at New York, and which line had been publicly advertised for several weeks before said 16th day of May; that on or about the said 16th day of May, 1855, your petitioner duly applied to the collector of customs at the port of New York for a clearance for said steamship Ocean Bird from New York to Havana, and presented to said collector the proper papers to entitle him to such clearance; that the said collector acting, as he stated, and as your petitioner believes, under instructions to that effect from the President of the United States, refused to give a clearance for said steamship Ocean Bird or to allow her to leave the port of New York.

4 And your petitioner further shows, that on or about the 25th day of May, 1855, a fleet of armed vessels, under the command of an officer of the United States Navy, by order of the President of the United States, took position near the wharf at which the steamships of your petitioner were then lying, and blockaded the same; and the officer in command of said armed vessels informed your petitioner that such force was so placed by command of the President of the United States, to prevent the departure from the port of New York of any of your petitioner's said steamships, and that he was ordered to fire upon and sink either of said vessels that might attempt to leave the wharf.

And your petitioner further shows, that afterwards, and at some time before the third day of July, 1855, the said steamship St. Lawrence arrived at the port of New York and proceeded to her wharf, where the United States and Ocean Bird were then lying, where she was also blockaded by said armed vessels of the United States from said third day of July, 1855, to the 10th day of July, 1855.

And your petitioner further shows, that believing said interference on the part of the authorities of the United States was induced by a suspicion that the proposed voyage of the steamship United States was in aid of an unlawful expedition against the Republic of Nicaragua, although such suspicion was entirely without foundation, abandoned the said proposed voyage, and so informed the collector at New York, and applied for a clearance for said steamship United States from New York to Havana, but said collector,

for the same reason as he had before assigned, refused such clearance; that the blockade and forcible detention of said steamships was continued from the said 25th day of May, 1855. down to the 10th day of July, 1855, and by reason thereof, and of the refusal of said collector to give clearances to said steamships, as aforesaid, the said steamships were detained at the port of New York, the United States from the seventh day of May, 1855, to the tenth day of July, 1855, the Ocean Bird from the sixteenth day of May, 1855, to the tenth day of July, 1855, and the St. Lawrence from the third day of July, 1855, to the tenth day of July, 1855; that by reason, and in consequence of such detention, your petitioner was prevented from making the voyage to Nicaragua provided for in said contract, which said voyage could and would have been made in the space of fifteen days, and wholly lost all the benefits and advantages of said contract, and of the demurrage agreed to be paid to your petitioner by said Kinney, Fabens & Webster for the steamship United States, and also the value of the demurrage of said steamship Ocean Bird from the sixteenth day of May, 1855. to the tenth day of July, 1855, and of the steamship St. Lawrence from the third day of July, 1855, to the tenth day of July, 1855.

And your petitioner further shows, that the interference on the part of the authorities of the United States with your petitioner's said vessels hereinbefore set forth was wholly unlawful, unjust, and unwarrantable; that your petitioner was not, nor were any of said ships, engaged in any unlawful act or proceeding whatsoever, but said steamships were about to be employed by him only in lawful and legitimate commerce; that no judicial proceedings were ever instituted against any of said steamships or against this petitioner, and that said interference with, and detention of, said steamships was without color of right, and was an unjustifiable and arbitrary exercise of executive power to the oppression and injury of your petitioner.

And your petitioner further shows, that the value of the use of said steamships, and the direct and actual loss to your petitioner by reason of their detention, as aforesaid, was as follows:

The amount secured to be paid as and for the charter money of the said steamship United States, for the voyage to San Juan under said contract with said Kinney, Fabens and Webster, being the sum of twenty thousand dollars, and in addition thereto the sum of twelve hundred dollars for each and every day the steamship United States was so detained, excepting the space of fifteen days, the time which would have been required to make said voyage.

For the detention of the steamship Ocean Bird, the sum of twelve hundred dollars per day.

For the detention of the St. Lawrence, six hundred dollars per day.

That the direct and immediate loss and damage sustained by your petitioner by the detention of said steamships in the port of New York, as hereinbefore set forth, amounts to the sum of one hundred and forty-one thousand dollars ($141,000).

And your petitioner further shows, that he is the sole owner of the

claim herein stated and set forth; that a petition for relief in the premises was by him presented to the House of Representatives of the Congress of the United States and by that body referred to the Committee on Foreign Affairs; that said petition was afterwards reported to the house without any action being taken thereon, and referred to the Judiciary Committee; that proof was submitted by your petitioner to said last-named committee touching said claim, and after deliberation the said petition and proof were reported to the House of Representatives and referred to this court.

This petitioner further says, that he has received from no person or persons any money on account of said contract with Kinney, Fabens and Webster, or of the damages sustained by him by reason of the non-performance of the said contract, or of any of the loss or
6 damage sustained by him by reason of the facts hereinabove set forth; that said Kinney and his associates named in said contract were ready and willing to comply with all its conditions, and would have done so had not the government prevented the sailing of the steamship United States in the manner above stated; that said Kinney and associates refused to pay anything on account of said contract or to imdemnify in any manner this petitioner for the detention of his said vessels, and that this petitioner has no claim upon them or either of them for the losses he has sustained in the premises.

And your petitioner further shows, that he has sustained damages by reason of the trespasses by the government herein set forth in the sum of one hundred and forty-one thousand dollars, ($141,000,) for which sum he respectfully asks the court to render judgment against the United States, with the costs and disbursements by him incurred in this proceeding.

JOHN GRAHAM.

SAM'L J. GLASSEY,
Attorney for Claimant, 61 *Chambers Street, New York.*

STATE OF NEW YORK, *City and County of New York. ss.*

John Graham, the above-named petitioner and claimant, being duly sworn, deposes and says that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that he believes the same to be true. He further says that he is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsetts, and that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made.

JOHN GRAHAM.

Sworn to and subscribed before me this second day of November, 1866.

HENRY GREENFIELD,
Notary Public and Commissioner of the Court of Claims.

Exhibit "A."—Referred to in the foregoing petition.

This agreement, by and between John Graham of the first part, and Henry L. Kinney, Joseph W. Fabens, and Fletcher Webster, of the second part, witnesseth: That the said party of the first part, in consideration of the mutual covenants herein contained, hereby agree to and with the said parties of the second part, that he, the party of the first part, will on the seventh day of May next, dispatch from the port of New York, for the port of San Juan de Nicaragua, either one of the above-named steamships, viz: the United States, the Ocean Bird, or the St: Lawrence, well found in all respects, provisioned and manned for the voyage, and capable of conveying safely five hundred passengers, if so many shall apply; and in consideration therefor the said parties of the second part undertake, promise, and agree with the said party of the first part, that he shall receive for the performance of the voyage, as aforesaid, the sum of twenty
7 thousand dollars; that is to say, that if the receipts for freights and passengers on the said voyage shall fall short of said sum of twenty thousand dollars the said parties of the second part, on the adjustment of the voyage and the ascertainment of a deficiency, will pay on demand to said Graham, party of the first part, the difference, if any there be, between the sum received for freight and passage-money, and the sum of twenty thousand dollars so that he shall receive for the performance of the said voyage the just and full sum of twenty thousand dollars as aforesaid.

It is further agreed, that if the receipts of said voyage shall exceed the sum of twenty-five thousand dollars, the surplus, whatever it may be, shall be equally divided between the parties of the first and second part, one-half to the party of first part, and one-half to the parties of the second part.

Witness our hand and seals this eighteenth day of April, 1855.

[SEAL.]	H. L. KENNEY.
[SEAL.]	JOSEPH W. FABENS.
[SEAL.]	FLETCHER WEBSTER.
[SEAL.]	JOHN GRAHAM.

Sealed and delivered in the presence of—

AMOS B. CORWIN.

8 In the Court of Claims.

JOHN GRAHAM
vs.
THE UNITED STATES.

And now, to wit, 6th of May, 1867, the court, upon due consideration of the premises, do order, adjudge, and decree that the said claimant take nothing by his suit, and that the said petition be dismissed.

By the court.

9 In the Court of Claims.

JOHN GRAHAM
vs.
THE UNITED STATES.

The claimant, by his counsel, prays an appeal to the Supreme Court of the United States from the judgment of the Court of Claims rendered in this cause on the sixth day of May, in the year 1867.

CHARLES J. BLAKE,
SAM'L G. GLASSEY,
Attorneys for Claimants.

CARLISLE & McPHERSON,
Of Counsel.

Filed in clerk's office Aug. 2nd, 1867. In vacation, Aug. 2nd, 1867. Appeal allowed; certificate will be made hereafter. 2nd August, 1867.

JOS. CASEY, *Chief Justice*

10 *Finding of the facts in the case by the court, and the conclusions on which thn ccurt founds its judgment.*

JOHN GRAHAM
vs.
THE UNITED STATES.

LORING, J.

The petitioner claimed compensation for the detention of their steamships, named respectively the United States, the Ocean Bird, and the St. Lawrence, in the harbor of New York, by the order of the President of the United States, and the court found the following facts: That on the 18th day of April, 1855, and thereafter, until the 10th day of July, 1855, the petitioner was the sole owner of said three steamships; that in May, 1855, the steamships United States and Ocean Bird were in the harbor of New York and ready for sea; that on or about the 3d of July, 1855, the steamship St. Lawrence arrived from sea in the harbor of New York and prepared for sea; that by an agreement made the 18th day of April, 1855, between the petitioner of the one part, and Henry L. Kinney,
11 Joseph W. Fabens, and Fletcher Webster, of the other part, the petitioner had agreed to despatch on the 7th day of May then next ensuing from New York to San Juan de Nicaragua either one of the three steamships above-mentioned, well found, provisioned and manned, and capable of conveying safely 500 passengers; and the parties of the second part guaranteed that the claimant should receive from freight and passengers $20,000, and if more was received, the surplus was to be divided between the parties; that the said steamship United States was afterward appointed for the performance of said voyage, in said agreement specified, and was ready therefore, and first advertised to sail thereon on the 7th day of May, 1855, but was delayed by the mutual agreement of said parties, for the conve-

nience of passengers, until the 20th of May, 1855, and was
12 appointed and advertised to sail on said day last mentioned;
that on the first Tuesday of April, 1855, Henry L. Kinney and Joseph W. Fabens were indicted by the grand jury for the southern district of New York for setting on foot a military enterprise against the Republic of Nicaragua, and were arrested and held to bail by the United States District Court for said district; but on the 7th day of May were discharged on their own recognisance, in the sum of one thousand dollars each, because the government were not then prepared to proceed to trial, and the
continuance of the case which it sought was refused by the
13 court; that on the 30th of April, 1855, by letter of that date, the petitioner wrote to Mr. Marcy, informing him he had chartered the steamer United States to Col. Kenney and his associates to convey him and his friends to San Juan de Nicaragua, and asking if the government considered "this proceeding legitimate." Mr. Marcy, in reply, informed the petitioner that a gentleman connected with Col. Kenney "had been at Washington to represent it to be a mere emigration movement," and added, "others present it to our notice in a different light." Mr. Marcy further stated that judicial proceedings were pending, and therefore declined to express any definite opinion on the subject, and in a further correspondence referred the petitioner to the district attorney
14 of the United States at New York; that on or about the seventh of May, 1855, the petitioner applied at the custom-house in New York for a clearance for said steamship United States for the port of San Juan de Nicaragua, and it was refused; that some days afterwards he applied for a clearance of said ship to Havana, and it was refused; and on or about the 15th day of May he applied for a clearance of the Ocean Bird and St. Lawrence for Havana, and it was refused. The collector stated he was instructed not to clear said vessels by the Executive at Washington.

15 Previous to the twenty-fifth day of May, 1855, the steamships United States and Ocean Bird were in their dock at New York ready for sea, and by telegraphic orders from the President of the United States, Capt. Boarman, of the United States navy, on 24th of May, 1855, placed a naval force in the vicinity said steamships and prevented their departure from the harbor of New York. On the twenty-fifth day of May the President, by orders in writing, informed Capt. Boarman that he (the President) had been officially informed that indictments had been found against Henry L. Kinney and John W. Fabens in New York, and against Henry L. Kinney in the eastern district of Pennsylvania, charging them with setting on foot a military expedition against the Republic of Nicaragua, and that the steamship United States had been chartered to them and Fletcher Webster for the purpose of being employed in said military expedition and was about to sail from New
York to carry them, their followers, and associates, enlisted
15 or engaged for said expedition, to their destination at Nicaragua. And the President commanded Captain Boarman as fol-

lows: "You are therefore hereby commanded and empowered, in virtue of the eighth section of the act of Congress, approved the 20th of April, 1818, to take all proper measures, and employ such part of the naval force of the United States under your command as may be necessary, to prevent the carrying on of such expedition or enterprise, and especially to prevent the departure of the said steamer United States from beyond the limits of said district of New York." And by an order dated May 30th, 1855, the President referred to his order of May 25th, 1855, and commanded Captain Boarman as follows: "You are hereby directed to consider that order as also embracing any other vessel within that district which may have been or may be chartered or fitted out for a similar purpose by the same parties who chartered the United States." And the detention of said steamships under these orders ceased on 10th May.

16 By the refusal of the clearances, and under the orders aforesaid, the said steamship Ocean Bird was detained in the harbor of New York from the sixteenth day of May to the 10th day of July. 1855, inclusive, and the steamship United States was so detained from the 20th day of May to the 10th day of July, inclusive; that the demurrage of the Ocean Bird, as a compensation for her detention, if allowed, should be estimated at nine hundred dollars per day, and the demurrage of the United States, (if allowed,) at eight hundred dollars per day; that the charter-party or agreement above mentioned, as made between the petitioner and said Kinney, Fabens and Webster, was abandoned by the parties thereto by mutual consent on or about the 1st of June, on account of the detention of the steamship United States by the government as above set forth.

The voyage provided for by said agreement would have occupied twenty-five days.

17 And the petitioner claimed that upon the facts proved an implied contract on the part of the United States arose to make the petitioner compensation for the losses and damages sustained by him by the detention of his vessels as above stated; but the court decided that no such contract arose, and that the United States were entitled to judgment, to go without day, &c.

18 In the Court of Claims.

JOHN GRAHAM
vs.
THE UNITED STATES. } No. 794.

I, Samuel H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the proceedings in the above-entitled cause, and of the final judgment of the court thereon, of the application of the counsel for claimant for the allowance of an appeal, and of the order of the chief justice in vacation allowing the same, and of the finding of the facts by the

court, and the conclusions of law on said facts on which the court founds its judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 6th day of December, A. D. 1867.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

U. S. Supreme Court.

JOHN GRAHAM,
Petitioner and Appellant,

vs.

THE UNITED STATES,
Respondent.

BRIEF FOR APPELLANT,

ON APPEAL FROM THE COURT OF CLAIMS.

SAMUEL J. GLASSEY,
Solicitor.

J. M. CARLISLE,
CHARLES F. BLAKE,
Of Counsel.

NEW YORK:
E. HOYT & CO., BOOK AND JOB PRINTERS, 120 WILLIAM STREET.
1869.

Supreme Court of the U. S.

JOHN GRAHAM,
Petitioner and Appellant,
vs.
THE UNITED STATES,
Respondent.

On Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

It appears by the facts found, that in the month of May, 1855, the appellant was the owner of the steamships "Ocean Bird" and "United States."

That the Ocean Bird was detained, by Executive order, in the port of New York, from the 16th day of May to the 10th day of July, a period of 55 days.

That the United States was similarly detained from the 20th of May to the 10th of July, a period of 51 days.

The facts bearing upon the cause of her detention are:

That the United States was chartered by Kinney, Fabens & Webster to carry passengers and freight to Nicaragua; that on the first Tuesday of April, 1855, Kinney and Fabens were indicted under the Neutrality Act, for setting on foot a military expedition against Nicaragua, and were arrested and held to bail; and that on the 7th of May they were released on their own recognizances.

Upon these facts it is submitted:

First.– That there is an entire absence of evidence to sustain any charge against the Ocean Bird. She was one of three vessels from which, under the charter party, Kinney and his associates were entitled to select one for the voyage to Nicaragua. But it appears (fol. 11) that prior to the 7th of May, the power to select had been exercised, and that the United States had been designated for the voyage. From the moment of that selection, the Ocean Bird ceased to have any connection with Kinney, or any concern with his acts. And it is thus apparent that from the date of her detention, May 16th, there is an entire absence of evidence of any charge against the Ocean Bird or her owners, or any one connected with her, of any breach of law, or of any design to break the law.

Second.—In regard to the United States: Prior to the date of her detention (May 20), the charge against Kinney and his party had been practically abandoned by the release of Kinney and Fabens on their own recognizances. There is

no evidence against the ship, her owner, or her charterers, of any guilty acts or guilty purposes at any time. It is proved that the Grand Jury had found cause to indict two of the latter; but it is also found that when the matter came before the Court, the government could not proceed to trial, or offer any sufficient reason why the defendants should not be released on their own recognizances. And it appears that it was not until thirteen days afterwards that the seizure complained of took place. We are bound to suppose that if any evidence against the vessel existed in the executive records, or in the Clerk's or District Attorney's office in New York, that it would have been produced. And the seizure thus stands as an executive act under the 8th section of the Act of 1818, without a word of proof to show guilt or charge of guilt against the vessel.

The case then shows a seizure of two steamships, the property of a private citizen of the United States, under the powers conferred upon the President by the Neutrality Acts. There is no evidence of guilt against the vessels or their owner, and the law presumes their innocence. And the naked question is thus presented whether, if the Executive employs the powers conferred by the act against innocent ships or owners, the United States are liable for the injury suffered.

I. A seizure by the Executive under the 8th section of the

Act of 1818, is an Act of State for which the officer making it cannot in any event be held liable.

Gelston, *v.* Hoyt, 3d Wheat., 246.

II. If then the officer seizing cannot be held, the United States must be liable, for no power can under the Constitution be vested any where in the government to seize the property of an innocent citizen, without due process of law. And if the United States, in their corporate capacity, do that which, if done by an individual, would raise a cause of action, the United States is, like the individual, liable.

A. The petition is framed on the theory of an implied contract on the part of the United States to pay for the detention of these vessels. It was so framed upon the authority of the case of Straughan's executors, which holds that the government cannot commit a tort, because it is incapable of malice, express or implied.

B. If the injury done by the seizure was in the nature of a tort, the tort can be waived by the party injured, and he may sue in assumpsit.

C. What then is the implied contract? It is that the United States have promised to pay for the use of the vessels during the time of their detention.

1. If the State is an individual, the subject of duties, and capable of incurring liabilities, there is nothing in its nature which prevents it from incurring them in the manner in which individuals incur them. If the State buy or hire property it is liable to pay for it. There is no intrinsic difference between the liability of the man who promises to pay a hundred dollars for the use of my horse for six months, and the liability of him who takes my horse for six months without a contract. In the one case the contract is made out by the papers; in the other the law assumes that he could not take my horse without agreeing to pay for his use. In the one case the proper sum to be paid has been agreed upon between the parties; in the other the law says that the party taking the horse has agreed to pay what his use is worth, and it affords the means to find what that may be. There is here between these two contracts no difference touching the distinction between the government and the individual, in such manner as to render the government capable of express contracts, but incapable of implied contracts.

It is true that this Government is one of limited powers. No one can bind it beyond the powers conferred by the Constitution, and no public officer can affect it by acts exceeding the authority given by statute. But the case before us is governed by an exceptional principle, that while the President may seize in the cases provided in the act; yet, if the

seizure be afterwards found to be wholly without just ground, the officer seizing is not liable. (Gelston v. Hoyt.) In this respect, therefore, the act of the President depriving an innocent individual of his property is the authorized act of the Government, for which the Government must be held liable.

2. The detention by the Government of an innocent ship by the Act of 1818 is a taking of private property for public uses, and under the 5th amendment to the Constitution the United States must make just compensation.

A. Captain Graham's ships were his private property.

B. They were taken for a public use. They were detained in the port of New York that duty of the country to a foreign State might be performed. The President thought that it was essential to the welfare of the United States, in its relations to a friendly State, that Captain Graham's ships should not sail, and he therefore directed their seizure. It is easy to imagine cases when the seizure and detention of a vessel might be of far greater public use than her seizure and employment as a transport.

C. It is well settled by express decision that a temporary detention of property is a taking entitling the owner to compensation. In Winslow *et al vs.* Gifford, 6 Cush., 327, it was held that a momentary occupation of the plaintiffs' land for the purpose of making surveys for public purposes was not a taking under the right of eminent domain, so as to entitle the owner to compensation. The Court compared it to the act of a sheriff coming upon private property to make an arrest, and to other momentary and technical trespasses, attended with no real injury to the owner, and undertaken for the common good. But in a late case the same Court held that an occupation for three days of the plaintiff's close for the purpose of a militia encampment, "was an exclusive appropriation to a specific public use, of the property of an individual for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage," and that it was therefore within the meaning of the constitutional provision. Mr. Justice Bigelow thought "that the statement of such a claim" (as that set up in the defence) "was sufficient to refute it."

Brigham *v.* Edmonds, 7 Gray, 359; and see Hooker *v.* Northampton, 14 Conn., 146.

In Cushman *v.* Smith, 34 Maine, 247, this same rule was incidentally applied. The question there was, whether, under the constitution of that State, the Legislature was prohibited from permitting the temporary use of private property as an incipient step to its acquisition, without compensation previously made. It was held that the previous compensation was not required when the entry was made with a view to acquiring the property; but that such an

entry would become a tresspass unless followed by timely proceedings to acquire title, and by the tender of just compensation. In other words, a momentary occupation is not a taking, but if it becomes appreciable in its effects, compensation must be made.

D. There is a large class of cases holding that the doctrine of compensation for the exercise of eminent domain does not extend to consequential damage. Of these cases, Radcliff *agst.* The Mayor, 4 Comst., 195, and O'Connor *v.* Pittsbury, 6 Harr., 187, are the strongest and most extreme. They hold that when damage results to an abutter by a change in the grade of a street lawfully made, no right to compensation ensues. But no case can be found where the doctrine was applied to property which was *itself* the subject of the act causing the damage. In Radcliff's case, for instance, the act which caused the injury was done, not to the plaintiff's property, but to the public street. In our case the ships themselves were acted upon by the Government.

E. If the Government had taken the ships of the petitioner, and had used them for sixty days as transports, would there not have been an implied contract to pay for them? And how does it better the case for the Government, if, after depriving the petitioner of the use of his ships, it left them idle at the wharf.

III. In the case of Straughan's Administratrix *v.* The United States, this Court laid down the following rule: "There is no such thing as a tort by a government against an individual. As between a citizen and his own government, acts which between private persons would be torts are to be deemed implied contracts, founded on the right of eminent domain, or else, acts unavoidable and necessary for the public welfare; but never acts founded upon a wrongful or malicious intent." To apply this rule to the case before us, if Captain Graham's ships had been seized by a private person for forfeiture under the neutrality laws, and they had been guilty, the seizor would have been justified; if they had been seized by a private person, and had turned out innocent, the seizor would then have been liable in tort; if seized under a similar mistake of facts by the government, an implied promise, resulting from the nature of government, or an express promise by constitutional provision, *contracts to* give the injured party the value of the use of his property.

The rule in Straughan's case classifies acts which, done by private persons would be torts, in two divisions, first: those which raise implied contracts under the doctrine of eminent domain, and secondly, acts unavoidable and necessary for the public welfare. The case before us belongs necessarily to the former of these classes, for the foundation of the right of eminent domain is the public necessity. "In places where it would be only convenient and not necessary," says Mr. Justice Woodbury in West River Bridge *vs.* Dix, 6 How., 546, "I entertain strong doubts of its applicability." And see—

Bloodgood *vs.* W. R. R. R., 18 Wend., 9.
Beekman *vs.* Saratoga, and S. R. R., 3 Paige, 45.

The "necessity" spoken of in Straughan's case must not be confounded with the doctrine known to the Common Law as the doctrine of necessity. It is an ancient and familiar rule that if a person pluck down a house to prevent the spread of fire, or throw goods from a barge to save the lives of passengers, he is not liable in damages.

The Saltpeter Case, 12 Co., 13.
Mouse's Case, 12 Co., 63.
And cases cited hereafter.

But as Chief Justice Nelson says, "Houses may be pulled down or bulwarks raised for the preservation and defence of the country without subjecting the person concerned to an action; and yet there are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle. In all the cases in the books denying the remedy at Common Law, it is admitted that the party may justly claim satisfaction from the public." Citing Meredith's case 41, 797.

Mayor of New York *v.* Lord, 17 Wend., 285, 291.

The right of necessity is the right of an individual to act, and, under circumstances of extreme peril, to avert sudden and great impending danger. It is a natural right, independent of society. But when a government acts under such a necessity, it exercises the right of eminent domain.

"The right of eminent domain," said the Court of Errors of New Jersey, "is the right of the government to appropriate private property to public uses in case of necessity. The right of necessity is the right of individuals either singly or collectively, in case of overwhelming necessity, to violate or destroy private property. When this right is exercised by government through and at the discretion of its officers regulated by law, it becomes the right of eminent domain."

Hale *v.* Lawrence, 13 Zabr., 714.

"Again, there is no analogy between the case of an individual seeking to save life from instant and overwhelming danger by the sacrifice of property, and the act of a government making use of property belonging to citizens to further its diplomatic ends. There is an important distinction between that mere appropriation for public utility under a general State necessity, and which comes within the doctrine of urgent necessity, which for immediate preservation imperatively demands immediate action." (American Print Works *v.* Lawrence, 33 Zab., 605.) No case can be found in which the common law doctrine of necessity has been applied to a taking of property by the government for public uses.

The Saltpetre case settles that the king may, for the defence of the realm, dig on private soil for the manufacture of gunpowder. The question of compensation did not come

under discussion. It is certainly not the law of the United States that the government may take the munitions of war from private persons without compensation.

Mouse's case decides that trespass will not lie against a man who threw property, from a barge in danger of foundering, into the sea.

Res publica *v.* Sparhawk, 1 Dallas, 357, decides that government may require the removal of provisions (contraband of war) to a place where they can be protected against capture by the enemy, and that if they are afterwards captured the commonwealth is not liable for the loss, under a statute which provides for compensation for "services performed, moneys advanced, or articles furnished," and which does not provide for damages.

In the cases which arose out of the New York fire in 1837, it was decided—

1. That under the statute of New York regulating the common law right of necessity in the case of fire, the owners

of the buildings destroyed might recover for personal property belonging to them within the buildings.

Mayor *v.* Lord, 17 Wend., 385.
Lord *v.* the Mayor, 18 Wend., 126.

2. But not persons having no interest or estate in the buildingss.

Mayor *v.* Stone, 20 Wend., 139.
Same *v.* Same, 25 Wend., 157.

3. And finally, that no action at common law lies against the city of New York for personal property situated in buildings destroyed by its Mayor under the statute. It was held by the Court that the statute is not an exercise of the right of eminent domain, but a regulation of the common law right of necessity. Mr. Justice Bronson, the only Judge who delivered an opinion in the case, puts this upon the express ground that if the property was taken it was not taken for a public use, but for the good of those in the neighborhood whose property was menaced; concurring upon this point with the eminent Chief Justice Oakley, of the Superior Court of New York.

Suits were also brought in New Jersey against the Mayor, in his personal capacity, for the destruction of personal property in the buildings destroyed. The Court, in the first instance, followed the New York decisions, and held that the Statute was not passed under the power of eminent domain, but that it was a mere regulation of the common law right of necessity. This decision was reversed on appeal, the Court of Errors holding that the Statute was an exercise of the power of eminent domain, and that as it made no provision for compensation for private property destroyed, it was unconstitutional, and therefore the defendant was liable. The defendant thereupon set up the common law doctrine of necessity, and this was held by the Court of Errors to be a good defence.

In Surocco *v.* Geary, it was held that a person tearing down a building to prevent the spread of fire is not liable therefor; that this was not taking property for public purposes, but an exercise of the common law right of necessity.

3 Cal., 69.

IV If the United States are not liable for the seizure of innocent ships seized under the Neutrality Acts, then the act itself is unconstitutional. It is competent for the legislature to provide for any taking of property for public uses, when compensation is also provided; but it cannot authorize any uncompensated interference with the rights of property, except by due process of law.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

JOHN GRAHAM, APPELLANT,
vs.
THE UNITED STATES. } No. 199.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

T. LYLE DICKEY,
Assistant Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

JOHN GRAHAM, APPELLANT,
vs.
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No. 199.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

FACTS.

In the spring and summer of 1855, claimant was the owner of ocean steamers, and had an agreement with H. L. Kinney and others to dispatch one of his steamers from New York to San Juan de Nicaragua, found, provisioned, and manned, and capable of carrying safely five hundred passengers, and for which trip Kinney and others guaranteed his receipts to the amount of twenty thousand dollars.

Claimant got one, and afterward another, of his vessels ready for sea; but meanwhile Kinney and others became suspected, and were indicted in the district court of the United States for the southern district of New York, upon a charge of setting on foot a military enterprise against the republic of Nicaragua.

In consequence of this accusation, Kinney and others were arrested, but enlarged upon their own recognizance; and, by order of the President of the United States, claimant's steamers were restrained from leaving the port of New York near two months.

For this detention this suit is brought.

POINT.

No contract by the United States can be implied from the acts of its officers in arresting persons charged with offenses against the law, or in seizing or detaining property in relation to which it is charged that it was proposed to use such property for an unlawful purpose. If such arrest or detention was legal, it was *damnum absque injuria;* if illegal, it was the tortious act of the officers, for which the United States are not responsible.

T. LYLE DICKEY,
Assistant Attorney General.